

**Dworkin, Inc. and Daniel E. Fletcher.** Case 8-CA-22475

February 28, 1991

## DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
CRACRAFT AND RAUDABAUGH

On October 3, 1990, Administrative Law Judge Claude R. Wolfe issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed a brief answering the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions and to adopt the recommended Order.

## ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

<sup>1</sup> The General Counsel has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

*Paul C. Lund, Esq.*, for the General Counsel.  
*Mark V. Webber, Esq.*, for the Respondent.

## DECISION

## STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This proceeding was litigated before me at Cleveland, Ohio, on July 19, 1990, pursuant to charges and amended charges filed by Daniel E. Fletcher on February 22 and April 5, 1990, and complaint issued on April 6, 1990, alleging Dworkin, Inc. (Respondent) unlawfully discharged Fletcher on February 7, 1990,<sup>1</sup> because he engaged in concerted activity protected by the National Labor Relations Act (the Act). More specifically, General Counsel contends Fletcher was terminated because he reasonably and honestly invoked rights provided for in the collective-bargaining agreement between Dworkin, Inc. and Local Union No. 407, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL-CIO (the Union). Respondent denies the unfair labor practice allegations in the complaint, and raises affirmative defenses in its answer to the complaint. Those defenses are (1) the complaint fails to state a complaint on which relief can be granted, (2) Fletcher is barred from relief because he failed to exhaust contractual remedies and the Board should defer to the contractual grievance procedure, and (3)

Fletcher was terminated in accord with the terms of the collective-bargaining agreement. Affirmative defenses (1) and (2) are without merit because the complaint does state a cause of action and Fletcher was a probationary employee without access to the contractual grievance procedure. Item (3) may be a defense if Fletcher had been eligible to and had filed a grievance, but it is not a defense to the unfair labor practice here alleged.

On the entire record, and after consideration of the testimonial demeanor of the witnesses and the posttrial briefs of the parties, I make the following

## FINDINGS OF FACT

## I. JURISDICTION

The complaint alleges, Respondent admits, and I find Respondent is an Ohio corporation with its principal place of business located at Cleveland, Ohio, and is a common carrier in the interstate and intrastate transportation of freight and commodities. Annually, in the course and conduct of this business, Respondent derives gross revenues in excess of \$50,000 from the interstate transportation of freight and commodities, and is now, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

## II. LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

## III. THE ALLEGED UNFAIR LABOR PRACTICE

A. *Relevant Facts*

Fletcher, a union member, became a truckdriver employed by Respondent on January 16 in a 30-day probationary status as provided by a collective-bargaining agreement between Respondent and the Union. The agreement further provides a probationary employee may be discharged during the 30 days without further recourse.

On February 4, Fletcher was scheduled to haul steel from Cleveland, Ohio, to Louisville, Kentucky. That same day he read a newspaper article reporting an incident near Peebles in southern Ohio where shots fired at a convoy of tractor-trailer trucks resulted in the wounding of two men and damage to six trucks. The trucks were traveling from Armco Steel in Middletown, Ohio, near Dayton, to Armco Steel at Ashland, Kentucky. It was suspected the shooting was related to a wildcat strike by independent truckers protesting high fuel costs and low hauling rates. No arrests were made. The article does not directly lay the incident at the feet of the strikers.

After reading the article, Fletcher called the Kentucky State Police and asked if there was any trouble in the Louisville area. He was told there was not. On the following day, February 5, he delivered the load to Louisville. He then called Respondent's dispatcher and was directed to go to Middletown, Ohio, where he took lodging in a motel. That night the dispatcher called him and directed him to pick up a load at Armco Steel in Middletown and deliver it to Lordstown, Ohio.

According to Fletcher, on February 6, as he was waiting to be loaded at Armco's Middletown facility, another truck-

<sup>1</sup> All dates are 1990.

driver<sup>2</sup> showed Fletcher a hole in the windshield of his vehicle and advised Fletcher it was a bullet hole from a shot fired at this unnamed driver the day before as he was passing through Warren, Ohio, on Route 5. According to Fletcher, the other driver's story upset him because Lordstown is close to Warren. The two cities are located in the northeast corner of Ohio. Fletcher and Lou Smith,<sup>3</sup> another Dworkin driver, had their trucks loaded at Middletown. Smith called Respondent's Cleveland offices and then told Fletcher the two of them were to proceed to Lordstown, off-load, and proceed to Warren and reload. Smith also told Fletcher he was not going to Warren because there was trouble there. They agreed to meet the following morning and drive their trucks to Lordstown as a team because they considered that to be safer than going alone. After arriving at Lordstown Smith claimed equipment failure and therefore did not go to Warren.

That night, February 6, Fletcher called the Lordstown police who advised there was no trouble there. He then called the Warren police who only advised there were isolated incidents on Route 5 and he should use his own judgment. Fletcher does not say what these incidents amounted to. Albert Timko, the Warren Township chief of police, credibly testified there were some pickets at a truckstop on Route 5, his officers patrolled the area, and there were no reported incidents of shots fired or any incidents involving trucks on Route 5. Fletcher's telephone bill shows his call was to the police department in the city of Warren, not to the Warren Township police whose jurisdiction covers a horseshoe-shaped area around the city including the Route 5 area in question. Timko testified that his department regularly talks to the city police, and he heard no reports of any violence in connection with the truckdrivers' protest.

Fletcher says he became fearful, and his wife did not want him to go to Warren. Accordingly, he delivered the load to Lordstown, Ohio, on February 7, but refused to go to Warren. The sequence of events are as follows. He talked to Robert Surlus, Respondent's operations manager, on the telephone and asked if there was any freight. Surlus instructed him to call Leona Little, Respondent's dispatcher, at Austintown, Ohio, about 15 miles southeast of Warren as the crow flies. Fletcher told Surlus he did not want to drive in the Warren area because there was trouble there. Surlus merely told him to call Little. Fletcher called her. She instructed him to go to Warren and deliver steel from there to Elyria, Ohio, which is west of Cleveland. She dispatched 17 other drivers to Warren that day and all drove without incident. He told her that he did not want to go to Warren because he had read newspaper articles about strikes, he had seen a bullet hole in the windshield of another driver's truck, and the Warren police had told him there was violence. His previous testimony concerning what he was told does not mention reports of violence by the Warren police nor does his pretrial affidavit given to the Board. She told him there were pickets at Warren, but they were bothering no one. She further advised that he did not have to pass the picketers in any event because he could travel on different roads and bypass them both going to Warren from Lordstown and from

Warren to Elyria.<sup>4</sup> He was adamant in his refusal to go to Warren, and Little told him to call Surlus. Fletcher called Surlus, and recited the same reasons he had given Little for not wanting to go to Warren. Surlus directed him to proceed to Warren and load. Fletcher refused. Surlus told him he was terminated and should bring the truck in if he would not go to Warren. Fletcher drove the truck back to Dworkin's Cleveland terminal.

On February 10, Fletcher called Surlus, said he had made a mistake, and asked for his job back. Surlus refused to rehire him.

### B. Discussion and Conclusions

The issues here, as General Counsel and Respondent both recognize, are whether Fletcher's refusal to drive to Warren was an honest and reasonable assertion of a right provided for in the collective-bargaining agreement and therefore concerted activity as discussed in *NLRB v. City Disposal Systems*, 465 U.S. 822 (1984), and, if so, whether it was protected activity.

The collective-bargaining agreement contains the following provision, in relevant part:

Under no circumstances will an employee be required or assigned to engage in any activity involving dangerous conditions of work, or danger to person or property . . . .

An employee therefore has a contractual right to decline an assignment involving dangerous working conditions or danger to person or property. This being so, the questions then arise regarding whether Fletcher, as a probationary employee, can invoke that right and thereby engage in concerted activity, and, if he can, was his refusal to drive to Warren, Ohio, a reasonable and honest assertion of that right.

The parties agree in their posttrial briefs, and I find that Fletcher's status as a probationary employee does not bar him from asserting a contract right. Considering the *Plain Dealer* clipping of February 4, the unnamed driver's claim that someone had fired a bullet through a truck windshield on Route 5 near Warren, Ohio, on February 5, the reluctance of fellow driver Smith to drive to Warren for fear of violence, the noncommittal advice of the Warren city police that there were isolated incidents on Route 5 and Fletcher should exercise his own judgment on whether to drive there, and his wife's fear for his safety, it cannot fairly be said that Fletcher's initial decision to refuse to drive to Warren was not based on an honest and reasonable apprehension of physical danger. Looking at the situation from his point of view with the above information in hand, it was a reasonable conclusion to make in the circumstances. Accordingly, I conclude and find Fletcher was reasonably and honestly asserting a right set forth in the existing collective-bargaining agreement when he first called Surlus looking for freight, and told Surlus he did not want to drive in the Warren area because there was trouble there. *City Disposal* makes it clear that by so doing Fletcher engaged in concerted activity, and

<sup>2</sup>This driver's identity is unknown.

<sup>3</sup>Smith is no longer a Dworkin employee and did not testify.

<sup>4</sup>I credit Little's testimony that she proffered alternate routes to Fletcher. Her testimony in this regard was convincing and probable. His bare denials on this score were not convincing and are not credited.

*Interboro*<sup>5</sup> makes it clear the concerted activity was also protected as an effort to secure relief pursuant to the contractual provision quoted above. A discharge by Surlus at this point for this conduct would have violated Section 8(a)(1) of the Act, but Surlus did not then discharge him. Referred to Little, Fletcher refused the Warren assignment on the grounds it was not safe. Had Little not given him permission to traverse different highways to and from Warren and thus avoid contact with the pickets who were located at a truckstop on Route 5, his refusal to take the assignment would clearly have been protected, but she did give him permission to take alternative routes. This raises a new problem. Was his continued refusal of the assignment protected concerted activity after Little described what roads he could take to circumvent the pickets and Route 5? I think not. There is no evidence to suggest and I do not believe it can be reasonably concluded that Fletcher could or did honestly and reasonably believe that the danger he had feared extended unabated to the itinerary set forth by Little which avoided the picketing area in particular and Route 5 in general.<sup>6</sup>

General Counsel contends that article 9, section 1 of the collective-bargaining agreement prohibiting discharge, permanent replacement, or discipline for refusal "to enter upon any property involved in a primary labor dispute" is arguably applicable. I disagree. There is no evidence Fletcher based his refusal to go to Warren on any disinclination to "enter upon any property involved in a primary labor dispute." Fletcher does not so claim, and the most the record shows is that the presence of the pickets on Route 5 worried him in view of

what he had heard and surmised about the behavior of strikers, and that he therefore feared to drive where they were. There is no indication he thought there was, knew there was, or would have found a picket line at the Warren facility to which he was dispatched.

#### Conclusion

Fletcher was not engaged in concerted activity when he refused a trip to Warren using the route suggested by Little because he had no honest and reasonable belief harm might befall him if he did so. It is not clear to me that Respondent's work rule to the effect a driver refusing a load for the second time is considered a voluntary quit was properly applied to Fletcher in this instance as Respondent claims it was, but that issue is not properly before me inasmuch as I have concluded Fletcher's termination was not effected because he engaged in protected concerted activity. There therefore is no unfair labor practice remaining to be resolved and whether Respondent correctly applied its work rules to Fletcher is not an issue for me to decide.

#### CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Dworkin, Inc. did not commit an unfair labor practice by terminating the employment of Daniel E. Fletcher on February 7, 1990.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>7</sup>

#### ORDER

The complaint is dismissed.

<sup>5</sup> *Interboro Contractors*, 157 NLRB 1295, 1298-1299 (1966).

<sup>6</sup> As General Counsel points out, the detours would, according to the differing estimates of the witnesses, require from 2 to 30 additional miles of driving. I do not see that the length of the deviations from the shortest route is a matter of any significance in this proceeding. It would not decrease Fletcher's earnings because he is paid, as he testified, "23 percent of the gross take on the load." He drove company equipment therefore incurring no additional expense to him. Whatever the actual additional mileage might be, the maximum of 30 miles is not an unreasonably long jaunt. In any case, Fletcher's protest had nothing to do with the number of miles driven.

<sup>7</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.